No. 15035

# In the United States Court of Appeals for the Ninth Circuit

INTERMOUNTAIN EQUIPMENT COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION TO REVIEW AND SET ASIDE AND ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## AUTHORITIES CITED

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### JURISDICTION

This case is before the Court upon the petition of the Intermountain Equipment Company to review and set aside an order of the National Labor Relations Board (R. 85–87, 64–65)[1] issued against petitioner on December 16, 1955, following the usual proceedings under Section 10 of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), herein called the Act. In its answer the Board has requested enforcement of its order. This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair labor practices having occurred

[1] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

in Boise, Idaho, within this judicial circuit.[2] The Board's decision and order is reported at 114 N. L. R. B. No. 214.

## COUNTERSTATEMENT OF THE CASE

### I. The Board's findings of fact and conclusions of law

Briefly, the Board found that the Company violated Section 8 (a) (3) and (1) of the Act by withholding from those of its employees who were members of and represented by the Union[3] Christmas bonuses and sick leave benefits which it afforded to unrepresented employees, after having assured the Union in bargaining conferences that it would not treat the two groups disparately in this regard. The evidence upon which the Board based these findings, which is substantially undisputed, is summarized below.

#### A. The Company assures the Union, during bargaining negotiations, that it will not discriminate against the represented employees with respect to bonuses and sick leave

On June 26, 1953, the Union was certified by the Board as the collective bargaining representative of a unit of the Company's hourly-paid employees, roughly the equivalent of the parts department in the Company's Boise establishment (R. 28, 80; 10–11, 15, 162). On July 3, Frank Baldwin, the Union's secretary-

[2] The Company, an Idaho corporation, distributes construction equipment in the States of Washington and Idaho. Its operation in Boise, Idaho, the one involved in this proceeding, involves shipments of substantial value across state lines. The Company concedes that it is engaged in commerce within the meaning of the Act (R. 27; 10, 15, 161).

[3] General Teamsters, Warehousemen and Helpers Local Union 483.

treasurer, approached Philip Dufford, the Company's vice president and general manager, relative to a collective bargaining agreement (R. 29; 98, 112, 118–119). On three days thereafter the parties held negotiating meetings conducted by Baldwin and two rank-and-file employees for the Union and by Dufford and Ray Fortune for the Company (R. 29; 98, 113–115, 177). Dufford, being inexperienced in labor relations, had asked Fortune, who was in charge of labor relations for another employer, to assist him (R. 29; 114, 120–121, 169–170, 173–174).

The first bargaining meetings were held on July 22 (R. 29; 98, 113, 119). The Union presented the Company with a proposed contract which, among other things, called for a wage increase of about 46 cents an hour, a union shop, a Christmas bonus equivalent to one month's wages, six days of paid sick leave annually, and the retention of "special privileges," such as the coffee break, then being enjoyed by the employees (R. 44, n. 10; 194–198, 212–213, 219–220, 98–99, 115, 121–122, 224). The provisions of this proposed contract were read aloud (R. 98, 178–179, 212, 194). Dufford commented that the proposed 46 cent increase was "a little bit too high" and the Union then reduced its demand to 31 cents (R. 213–214).

At about the third session, the Union brought up its union-shop demand (R. 29; 98–100, 114–116). Dufford at first was opposed to it, but finally agreed to a union-shop provision which would give employees 60 days in which to join (R. 29; 98–100, 103–104, 117, 186–187). The subjects of bonuses and sick leave were then discussed (R. 29; 199).

Although, before 1953, the Company had paid Christmas bonuses for a number of years extending to before 1950, it had never formalized a bonus plan (R. 29, 80; 151, 153, 190–191, 232). The Company considered payment of a bonus to individual employees to be a matter of discretion on the part of management after consideration of a number of variable factors (R. 29–30; 149–151, 267–268). In practice, however, almost all the employees who had been employed for a year or more received a Christmas bonus amounting to approximately one month's wages or salary (R. 30, 80; 141, 153, 175–176, 190–192, 196, 209–210, 219).[4] With respect to compensated absences because of sickness or for other reasons, the Company likewise had no formalized policy (R. 30; 154–155, 166–167). It usually left the matter of compensation for time not worked to the department heads, who were lenient in such matters and granted time off without loss of pay, not only for sickness, but also to permit the employees to run errands or to take advantage of the hunting season (R. 30, 80; 154–155, 166–167, 172–173, 176, 192–193, 197–198, 246–247).

As previously noted, the Union was asking for a contract provision for six days' paid sick leave and for the payment of a Christmas bonus equivalent to a month's wages. Dufford objected to both provisions (R. 30). He objected to the sick leave provision on the ground that if it were put into the contract the

[4] The head of the parts department told an applicant for employment who was dissatisfied with the Company's wage scale that the employees received an annual bonus of approximately a month's wages (R. 209–210, 219). The applicant then took the job (R. 209–210).

employees would take sick leave whether or not they were sick (R. 30–31, 80; 99, 180, 214–215). He asked why the Union wanted sick leave in the contract and asked if the employees were not satisfied with the way the Company had handled sick leave in the past (R. 31; 215). One of the employee representatives replied that he had never taken sick leave but that he understood from the other employees that the sick leave practice had been satisfactory (*ibid.*). Dufford said that he was "proud" of the Company's sick-leave record, and pointed out that one employee who had been absent for an extended period because of polio had never been docked (*ibid.*). Baldwin asked if he would change the policy, and Dufford replied that he saw nothing in the near future that would justify changing the policy (*ibid.*). Dufford also assured the Union that in paying employees for sick leave, the Company would not discriminate against the employees in the bargaining unit (R. 31, 81; 100, 139, 181–182, 184, 263–266).

The discussion then shifted to the bonus clause. Dufford opposed this on the ground that the Company had no set policy regarding bonus payments; that they were strictly the prerogative of management; that the Company had never had any written bonus arrangement with any employee; and that if he agreed to put a bonus provision in the contract, the Company would have to pay a bonus whether or not the Company showed a profit and whether or not it paid one to the unrepresented employees (R. 31–32, 80; 99, 122, 142, 181–182, 216, 234). On several occasions during the negotiations, however, he assured the Union that the

Company had no intention of changing its bonus policy and would not discriminate between employees in the unit and employees outside the unit in paying a bonus (R. 32–33, 50–51, 81; 100, 124–125, 146, 182, 184, 263–266). Fortune commented that the company he represented paid bonuses to monthly-paid employees, such as those outside the unit in this case, but not to hourly-paid employees such as those in the unit (R. 32; 145, 182). Dufford said that the Company had never discriminated between these groups of employees with respect to the bonus (R. 32; 182). Baldwin expressed some concern that this practice might change and that employees outside the unit would be paid bonuses while those in the unit would not (R. 32; 100, 182, 220–221). Dufford said that it was not his intent to discriminate (R. 32, 81; 182, 184, 263–266).

Fortune assured Baldwin that Dufford would do what he said he would do (R. 33; 101, 185, 217). Baldwin took this to mean that Dufford's assurance about nondiscrimination could be relied upon and that the Company would continue to handle sick leave and bonus payments in the same manner as in the past (R. 33; 133–134). He called the two employee representatives out of the room for a conference and asked if they had always received a bonus and if the Union should take Dufford's word that the Company's policy would remain the same (R. 33; 101, 126, 131, 182, 217, 222). One of the employees, who had been with the Company for nearly five years, said that he had always received a bonus and that, as far as he knew, Dufford's word was good (R. 33; 101, 126, 131, 175, 182, 217). The other concurred (R. 33; 101, 131, 217).

Expecting a continuance of past practices with respect to bonuses and sick leave, the union negotiators returned to the meeting room and, without again mentioning the subject of bonuses and sick leave, began negotiating on wages (R. 33, 81; 101–102, 182). They agreed upon a wage increase of 26 cents an hour (R. 235). Except for the hourly rate increase the contract apparently did not provide benefits not previously enjoyed (R. 50; 103–108, 242–251).

After the parties had reached agreement on the terms of the contract on July 27, the union committee tendered the agreement to the employees in the unit with an explanation of what had been said about bonuses and sick leave (R. 33–34, 81; 103–109, 129–130, 187–190, 204–205). The employees approved the contract (R. 34; 130, 190).

After the execution of this contract, the Company reduced the hours of work for the employees in the bargaining unit from 47 to 40 hours a week, thereby eliminating substantial overtime payments to the represented employees (R. 50; 104, 106, 234–235, 251–253). As a result, their take-home pay was no greater than before and in some instances, at least, was slightly less (R. 50; 255–258). Many of the unrepresented employees, moreover, received individual merit increases and no such increases were received by the represented employees (R. 50; 238–239, 251).

**B. Following the execution of the collective bargaining agreement, the Company withdraws sick leave benefits and Christmas bonuses from the employees represented by the Union, while continuing to pay them to employees outside the unit**

Shortly after the Union's certification by the Board, the Company had a time clock installed for the em-

ployees in the unit (R. 34; 158, 170–171). Following the execution of the collective bargaining agreement in July 1953, the Company, without notifying the Union, instructed the supervisors of the employees in the unit that they should adhere strictly to the contract and not give the employees anything except that which was guaranteed by the contract (R. 34, 81; 157, 165, 109–110). As a result, only the time shown as worked by the clock was paid to the employees in the unit, and their absences due to sickness and other causes were no longer approved for compensation (R. 34, 81; 154, 156–157, 159–160, 176–177, 192–193, 210–211). Employees outside the certified unit were not required to punch the time clock and their supervisors were not instructed to make any change in the practice of compensating employees for absences due to illness or other causes (R. 34; 159, 172). Accordingly, the Board and Trial Examiner concluded that the practice of giving paid sick leave continued with respect to employees outside the certified unit (R. 34, 81).

In December of 1953, the Company, again without notifying the Union, decided to pay a Christmas bonus to the unrepresented employees but not to employees within the unit (R. 34, 81; 12, 17, 225–226, 267–268). After the bonus was paid to employees outside the unit, the Union had two meetings with the Company during which that subject was discussed (R. 35; 12, 17, 126–127, 226–227). Dufford expressed concern over how the Union found out who received a bonus and who did not, and the Company "took the position * * * it was a company prerogative, and if they wanted to pay them, they would * * * and that was

that" (R. 126–129). On January 4, 1954, Baldwin telephoned Dufford that he understood "some of the boys * * * had been docked for the sick leave" and asked whether the Company was going to pay it (R. 35; 110). Dufford "still took the position that was the Company's prerogative" (*ibid.*). The 1953 bonus was never paid to employees in the bargaining unit (R. 35; 12, 17). When the parties negotiated a new contract in 1954 a provision for sick leave, but not for bonuses, was agreed to (R. 35; 154, 167–168, 229, 239–240).

**C. The Board's conclusions**

The Board (with Chairman Leedom dissenting) found, in agreement with the Trial Examiner, that under the circumstances outlined above, the Company's disparate treatment, concerning bonuses and paid sick leave, in favor of unrepresented employees and to the detriment of employees in the bargaining unit "had the inherent effect of discouraging union membership and, therefore, constituted a violation of Section 8 (a) (3) and (1) of the Act" (R. 81, 56–58). The Board stated that the Company "must be held to have intended this foreseeable consequence of its conduct" and that, moreover, "the inference that the [Company] intended to discriminate because of union membership is buttressed by the circumstances" (R. 83, 84). The Board, however, dismissed that part of the complaint alleging that the Company's conduct regarding bonuses and sick leave violated Section 8 (a) (5) of the Act, on the ground that before the contract was executed, the parties had agreed

that such matters might remain within the Company's unilateral administration (subject to the assurances that it would not discriminate against the employees in the unit) and that, in any event, the Union was given an opportunity to negotiate on the matter after the bonus was given (R. 87, 37–42).

### II. The Board's order

The Board's order (R. 85–87, 64–65) requires the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, the Company is required to make whole those employees who, during the term of the 1953 contract, suffered a loss as the result of the Company's discrimination against them; and to post appropriate notices.[5]

#### QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by discontinuing bonus and sick leave payments to its employees who were represented by the

[5] Bonuses are to be calculated on the same nondiscriminatory basis that the Company used in determining whether or not employees outside the unit should receive a bonus for that year (R. 58–59, 86). Sick leave is to be paid on the same nondiscriminatory basis used in paying sick leave to employees outside the unit (R. 59–60, 86). However, since the contract required employees to assert claims for wages within 30 days of the time they accrued, back sick leave is to be paid only for the period after January 4, 1954, the first notice to the Company of any claim to compensation for sick leave (R. 59–60, 86; 109–110).

Union while continuing such payments to its unrepresented employees.

## SUMMARY OF ARGUMENT

There is substantial evidence on the record considered as a whole to support the Board's finding that the Company discriminated against its represented employees, in discontinuing the payment of sick leave and year-end bonuses to them, to discourage membership in the Union, thereby violating Section 8 (a) (3) and (1) of the Act.

While recognizing that an employer does not necessarily violate the Act merely by paying to his unrepresented employees benefits which he withholds from his represented employees, the Board was warranted in finding under the particular facts of this case that the Company had unlawfully discriminated against its represented employees. Since the Company, with full knowledge of all the Union's contract demands, had assured the Union during bargaining negotiations that it would not discriminate between its represented and its unrepresented employees in the payment of year-end bonuses and sick leave, thereby causing the Union to drop its demands for contractual provisions covering those items, the Board properly found that the Company's subsequent payment of such benefits to its unrepresented employees and withholding of such benefits from its represented employees, without giving them any reason for such disparate treatment, had the inherent effect of discouraging union membership.

Where, as here, the employer's conduct has the inherent effect of discouraging union membership, no specific proof of an intent to discourage union membership is necessary, for an employer is presumed to intend the foreseeable consequences of his conduct.

The Board properly rejected the Company's contention that its disparate treatment of the two groups was warranted because under its contract with the Union it "could" incur considerable expense which it was not obligated to incur on behalf of its unrepresented employees. In the first place, the record does not establish that the Company in fact incurred any added expense in behalf of its represented employees by reason of the contract which it did not incur in behalf of its unrepresented employees. A mere potential inequality of advantages, even in the absence of the Company's assurances to the Union during bargaining conferences, would not warrant the Company's discontinuance of the benefits only to the represented employees, for such disparate treatment inherently discourages union membership. In the second place, even if the Company had not in other ways balanced the contract advantages with other advantages to its unrepresented employees, it nevertheless would not have been warranted in giving disparate treatment to these two groups in respect to bonuses and sick leave, for during the bargaining negotiations, with full knowledge of all the Union's contract demands, it had assured the Union that it had no intention of discriminating or otherwise changing its policy with respect to the payment of these benefits, thereby causing the employees to accept a contract

which did not mention these benefits. In view of these assurances, the effect of the Company's subsequent disparate treatment of the two groups was to cause the represented employees reasonably to believe that the Company was punishing them for their union adherence, a result that necessarily discourages union membership.

## ARGUMENT

**The Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by discontinuing bonuses and sick leave payments to its employees who were represented by the Union while continuing such payments to its unrepresented employees is supported by substantial evidence on the record considered as a whole**

The Board's finding that the Company's disparate treatment of its represented and unrepresented employees with respect to the continuation of paid sick leave and year-end bonuses amounted to unlawful discrimination against the represented employees was based upon the particular facts of this case and not upon any assumption that an employer may never grant benefits to unrepresented employees which it withholds from its represented employees (see cases cited, *infra,* pp. 19–20). In this case, as the Board noted (R. 80–81), the Company assured the Union during bargaining negotiations that it would not discriminate against the represented employees with respect to bonuses and sick leave. As a result, the Union dropped its demands for contractual provisions covering those items and passed on to the employees the Company's assurances. After the contract was signed, however, the Company, without explanation to the employees or discussion with the Union, sum-

marily deprived the represented employees of bonuses and paid sick leave while continuing such benefits for the employees not covered by the contract.

Under the circumstances, the Board properly concluded that the effect of this disparate treatment, in view of the Company's previous assurances that all the employees would be treated alike, was to cause the represented employees reasonably to believe that the Company was punishing them for their union adherence, a result that necessarily discourages union membership (R. 83). In comparable situations the Board and the courts have uniformly held the employer's disparate treatment to be in violation of Section 8 (a) (1) and (3) of the Act. *General Motors Corp.* v. *N. L. R. B.,* 150 F. 2d 201 (C. A. 3), enforcing in pertinent part 59 N. L. R. B. 1143, 1144–1145, 1153; *Armstrong Cork Co.* v. *N. L. R. B.,* 211 F. 2d 843 (C. A. 5), enforcing 103 N. L. R. B. 133, 134–138; *Allis-Chalmers Mfg. Co.* v. *N. L. R. B.,* 162 F. 2d 435, 440 (C. A. 7).

In finding unlawful discrimination against the represented employees, no specific proof of the Company's motivation was necessary, for, as the Board stated (R. 81, 56–57), the disparate treatment had the inherent effect of discouraging union membership and the Company must be held to have intended this foreseeable consequence of its conduct. As the Supreme Court said in *Radio Officers' Union* v. *N. L. R. B.,* 347 U. S. 17, 45:

> This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is

> but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.
>
> Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage [or discourage] is sufficiently established.

See also, *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 795, 805.

The assurances made by the Company at the bargaining conferences that it had no intention of discriminating between represented and unrepresented employees were, as the Board pointed out (R. 83), "part of the context in which the employer acted and cannot be ignored in deciding whether his disparate action had the natural consequences of discouraging union membership whether the statements were made in all sincerity or not." The Company's action following the bargaining conference, however, indicates that these statements were not made in all sincerity and buttresses the inference that the Company intended to discriminate because of union membership. For, as the Board noted (R. 84), "immediately after signing the contract the [Company] deprived the represented employees of their paid sick leave. The immediacy of its action, totally unexplained, would give rise to an inference that the [Company] intended to discriminate because of union membership. While

several months elapsed before the disparate bonus payments, in the light of the prior action on the sick leave, and the absence again of any explanation to the employees, the same inference could be drawn. It seems unlikely that an employer motivated by no antiunion considerations would deprive only his represented employees of substantial benefits given unrepresented employees and which the former had been led to believe would be continued, without first explaining to them or their representative why the changes were made. The failure to discuss or explain before acting contrary to its prior statements casts serious doubts on the bona fides of the [Company's] actions and the purity of the motive behind them."

The only explanation offered the employees or their representative when they protested the discriminatory treatment was that the Company was exercising its management prerogatives (R. 35; 127, 129). Before the Board, however, the Company sought to defend its action by contending (1) that under its contract with the Union it "could" incur considerable expense which it was not obligated to incur on behalf of unrepresented employees; and (2) that if the Company had unilaterally paid a bonus to the represented employees, an unfair labor practice charge "conceivably could be filed" (R. 49; 268–269). The Board properly rejected both these contentions.

The Company's attempted justification for its action on the ground that it "could" have incurred considerable expense under its contract was rejected by the Board for several reasons (R. 49–54). In the first place, as we have already shown (*supra,* p. 7), the

Company did not establish that it in fact incurred any added expense in behalf of its represented employees by reason of the contractual provisions which it did not incur in behalf of its unrepresented employees. The increase in the hourly rate of pay was apparently the only contract item which could have resulted in additional cost to the Company and this was offset by the Company's elimination of 7 hours a week of overtime work at time and a half pay which its represented employees had been regularly receiving. Moreover, unlike the unrepresented employees, they received no individual merit increases. To be sure, if the Company had not eliminated the 7 hours a week of overtime work for its represented employees or had not given the individual merit increases to its unrepresented employees, it might have incurred additional expense under its contract for its represented employees which it would not have incurred for its unrepresented employees. This mere potential liability, however, even in the absence of the Company's assurances to the Union during the bargaining conferences that it would not discriminate against its represented employees in paying sick leave and bonuses, would not warrant the Company's discontinuance of these benefits to its represented employees while continuing them as to its unrepresented employees. Such disparate treatment inherently discourages membership in the Union.

In the second place, even if the Company had not in other ways balanced the contract advantages with other advantages to its unrepresented employees, it nevertheless would not have been warranted in giving

disparate treatment to these two groups in respect to bonuses and sick leave, for it had assured the union representatives during the bargaining negotiations that it had no intention of discriminating or otherwise changing its policy with respect to the payment of these benefits. On the basis of such assurances, the employees and their representatives were willing to leave to management's discretion the amount of sick leave and bonuses to be granted alike to all the employees. Furthermore, these assurances were given after the Company knew that the Union was seeking substantial wage increases and other benefits and did not purport to be in lieu of other concessions. Thus, at the first bargaining conference, the Union had submitted and the Company had read a proposed contract calling for a wage increase of 46 cents an hour, a union shop and the retention of "special privileges" (such as the coffee break), in addition to a Christmas bonus equivalent to one month's wages and six days of paid sick leave (*supra,* p. 3). Before any detailed discussion of the bonuses and sick leave occurred, the Company had commented that the proposed 46-cent wage increase was "a little bit too high" and had caused the Union to reduce its demand (R. 213–214). And within a week, the parties had signed the bargaining agreement. Accordingly, it can hardly be said that when the Company assured the Union it would not discriminate between the represented and unrepresented employees with respect to bonuses and sick leave, it had not contemplated granting the represented employees other substantial benefits. In these circumstances, the Board properly concluded that the

effect of this disparate treatment "was to cause the represented employees reasonably to believe that the [Company] was punishing them for their union adherence, a result that necessarily discourages union membership" (R. 83).

The Company's final asserted defense—that it was warranted in withholding the paid sick leave and bonuses from its represented employees while continuing to pay sick benefits and bonuses to its unrepresented employees because its unilateral payment of such benefits to the represented employees might conceivably have resulted in the filing of unfair labor practice charges—is plainly without merit. Aside from the fact that prior Board decisions furnished no basis for a belief that such payments could constitute an unfair labor practice,[6] it is elementary "that an employer may not commit unfair labor practices in order to avoid possible unfair labor practice charges." *General Motors Corp.*, 59 N. L. R. B. 1143, 1156, enforced, 150 F. 2d 201 (C. A. 3).

As previously stated, it is not the Board's position that any grant of benefits by an employer to his unrepresented employees which he withholds from his represented employees is necessarily unlawful discrimination against the latter. Indeed, the Board expressly recognized in this case that "an understanding that the bonus might be distributed unequally in order to balance any unequal advantages acquired under the contract might be presumed" under other circumstances (R. 49–50). In *Shell Oil Co.*, 77 N. L.

[6] See *Texas Foundries, Inc.*, 101 N. L. R. B. 1642, 1671; *Bishop, McCormick & Bishop*, 102 N. L. R. B. 1101, 1102.

R. B. 1306, 1309–1310, for example, the Board held that the employer did not unlawfully discriminate against his represented employees when he granted substantial wage increases to his unrepresented employees while denying the union's request that similar increases be given to the represented employees because at the time of the union's request it was engaged in bargaining with the employer for much higher stakes and it did not appear that the employer was unlawfully motivated in according the employees unequal treatment. See also *N. L. R. B.* v. *Appalachian Electric Power Co.,* 140 F. 2d 217, 219 (C. A. 4) where the employer, similarly, was held to have acted lawfully in granting a wage increase to unrepresented employees while temporarily withholding it from his represented employees pending contract negotiations; and *N. L. R. B.* v. *Nash-Finch Co.,* 211 F. 2d 622 (C. A. 8), holding that the employer acted lawfully in discontinuing bonus and insurance benefits to its represented employees only, where the union bargained these benefits away in exchange for wage increases and other benefits and agreed to the contract with notice that the employer intended to withdraw such benefits.[7]

[7] Indeed, the General Counsel who issued the complaint in this case refused to issue a complaint in two administrative decisions cited by petitioner at pp. 21–23 of its brief, where under different circumstances bonuses were granted to unrepresented employees and withheld from represented employees. In neither of those cases did the employer, as here, assure the union during bargaining negotiations that it would not discriminate between its represented and its unrepresented employees in the payment of bonuses. Moreover, in those cases, unlike in the instant case, the unrepresented employees had received no other advantages which tended to equalize the increases given to the represented employees.

In this case, however, the Union did not bargain away the bonuses and paid sick leave in exchange for other benefits and at the time it signed the contract had been assured by the Company that it would not discriminate between the represented and the unrepresented employees in the payment of bonuses and sick leave. At the bargaining conferences, the issue as to both sick leave and bonuses was not whether they should be continued or discontinued but whether a fixed amount should be guaranteed or the amount left, as in the past, to the discretion of management. The Company had assured the Union not only that it had no intention of discriminating between represented and unrepresented employees but also that it had no intention of changing its past practice with respect to paying these benefits (*supra,* pp. 4–6). Moreover, as already pointed out, when these assurances were given, the Company had already been put on notice of all the Union's contract demands and there is no basis for assuming that the assurances were meant to be in lieu of any of the provisions of the contract concluded shortly thereafter.

As the Board stated (R. 53), if an employer were free to discriminate between unrepresented and represented employees in continuing or discontinuing benefits on the ground that the contract covering the represented employees failed to guarantee continuance of those benefits, "he could with impunity deprive employees represented by a union of everything provided before the union became the chosen representative which improved working conditions while at the

same time continuing to provide such things for employees not so represented so long as nothing in the union contract provided therefor. So he might remove drinking fountains, washing facilities, work stools, adequate lighting, and many other improvements or conveniences from departments of employees represented by a union while continuing to provide the same thing for other employees." Such beneficial working conditions, like the bonuses and paid sick leave in this case, may be discontinued by the employer but if he does continue them he must do so on a nondiscriminatory basis. His elimination of such benefits only to the represented employees has the natural tendency to discourage union membership and is a violation of Section 8 (a) (3) and (1) of the Act.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition to review should be denied and that the Board's order should be enforced in full.

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AUGUST 1956.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

### UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

### PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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